

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

76-1196

B^{sec}
P/S

To be argued by 175
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against

MOHENDRA BUDHU,

Defendant-Appellant.

Docket Number 76-1196

APPENDIX FOR APPELLANT
MOHENDRA BUDHU

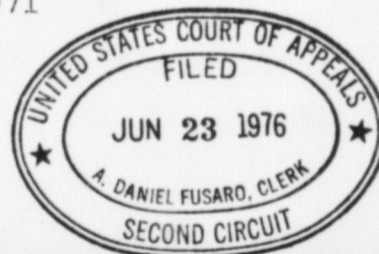
ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.
THE LEGAL AID SOCIETY

Attorney for Appellant
MOHENDRA BUDHU

FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

New York, New York
June 23, 1976



PAGINATION AS IN ORIGINAL COPY

I. CHARGES

18:1001 False statement to Govt. Agency. 1
18:911 False personation-citizen of U.S. 2
8:1325 Illegal entry. 3

ATTORNEYS

Constance Cushman
(212) 791-1930

II. KEY INTERVALS & DATES

ARREST 12-11-75 U.S. Custody Began on Above Charges	INDICTMENT <input checked="" type="checkbox"/> Information <input type="checkbox"/> 12-18-75 Waived <input type="checkbox"/> Superseding <input type="checkbox"/> Indict/Info <input type="checkbox"/>	ARRAIGNMENT 1st Plea Final Plea	TRIAL Trial Set For V. Date <input type="checkbox"/> Trial Began <input type="checkbox"/> Trial Ended <input type="checkbox"/>	Disposition <input type="checkbox"/> Convicted <input type="checkbox"/> Acquitted <input type="checkbox"/> Dismissed <input type="checkbox"/> Noted/Dismissed
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III. MAGISTRATE

Search Warrant	Issued	DATE	INITIAL/No.	INITIAL APPEARANCE	INITIAL/No.	OUTCOME
	Return			PRELIMINARY EXAMINATION OR REMOVAL HEARING	Date Scheduled Date Held	<input type="checkbox"/> Dismissed <input type="checkbox"/> Held for District GJ <input type="checkbox"/> Held to Answer to U.S. District
Summons	Issued			<input type="checkbox"/> Waived <input type="checkbox"/> Not Waived	<input type="checkbox"/> Intervening Indictment	AT:
Arrest Warrant	Served					Magistrate's Initials
COMPLAINT		12-11-75	HJR-080D	Tape No.	INITIAL/No.	
OFFENSE (In Complaint)						

IV. MAGISTRATE & DISTRICT COURT DOCKET ENTRIES

DATE	PROCEEDINGS	V. Exclud
12-18-75	Filed indictment.	(a) (b)
12-22-75	Deft. present (Atty. present) pleads not guilty. Bail at \$5,000 fixed by Magistrate continued. Deft. continued remanded in lieu of bail. Assigned to Motley, J. for all purposes. Knapp, J.	
12-30-75	Filed following papers recv'd. from Magistrate...complaint, financial affdvt. and order appointing counsel.	
1-29-76	Filed affdvt. & notice of motion for the suppression and return of bank books.....	
2-4-76	Filed order appointing Dr. C.D. Goldin to examine deft pursuant to 18 USC 4244. The office of U.S. Atty. is directed to pay a reasonable fee to Motley, J....	
2-20-76	Filed consent order that Dr. Norman Weiss examine deft to determine his mental capacity***Motley, J...	
2-25-76	Filed one(1) envelope to be sealed, impounded and placed in Vault in Cashier's office. So ordered- MOTLEY, J.	
2-24-76	Deft (Atty Daniel Steinbock) present. Application for reduction of Bail is Denied. Motley, J.	

BEST COPY AVAILABLE

175Cr.1220

ADVANCE REMOTE COPY

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
3-8-76	Filed defts requests to charge..				
3-9-76	Filed one Manila envelope ordered sealed and impounded and placed in clerks vault.....Motley,J.				
3-8-76	JURY trial began.....Motley,J.				
3-9-76	Trial cont'd.				
3-10-76	Trial cont'd. & concluded - Jury finds deft GUILTY on all Counts....P.S.I. ordered. Sent. adjd to 4-16-76 10 a.m. Deft. Remanded...Motley, J.				
3-12-76	Filed motion for issuance of subpoena...With memo endorsed. So Ordered...Motley,J.				
4--16-76	Filed Judgment(Atty.Daniel Steinbock,present)The deft. is committed to custody of the Atty.General for imprisonment for a period of TIME ALREADY SERVED.....MOTLEY, J.....Ent.4--19-76---				
4-22-76	Filed notice of appeal from judgment of 4-16-76..Leave to proceed in forma pauperis granted...Motley,J....Copy to U.S.Atty. and mailed to deft C/o Legal Aid Society U.S.Court House NYC10007				

H.
I.
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CC:emw
n-1321

75 CR. 1220

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA :

-v- :

MOHENDRA PARTABJI BUDHU, :

Defendant. :

B
INDICTMENT

75 Cr.

-----x
COUNT ONE

The Grand Jury charges:

On or about June 9, 1975, in the Southern District of New York, MOHENDRA PARTABJI BUDHU, the defendant, in a matter within the jurisdiction of a department and agency of the United States, namely, the Immigration and Naturalization Service, United States Department of Justice, unlawfully, wilfully and knowingly did make and use a false writing and document, to wit, an Application to File Petition for Naturalization, knowing said writing and document to contain false, fictitious and fraudulent statements and entries, to wit, that he had served in the United States Army from January 1, 1970 and had received an honorable discharge.

(Title 18, United States Code, Section 1001.)

CC:mr
n-1321

COUNT TWO

The Grand Jury further charges:

On or about the 22^d day of August, 1972, in the Southern District of New York, MOHENDRA PARTABJI BUDHU, the defendant, unlawfully wilfully and knowingly did falsely represent himself to be a citizen of the United States, in an application for employment at John C. Mandel Security Bureau, Inc.

(Title 18, United States Code, Section 911.)

COUNT THREE

The Grand Jury further charges:

In or about December, 1973 MOHENDRA PARTABJI BUDHU, the defendant, an alien, unlawfully, wilfully, and knowingly did enter the United States along the border between Canada and the State of New York, at a place other than as designated by immigration officers.

(Title 8, United States Code, Section 1325.

Ronald C. Burns, Jr.
FOREMAN

Thomas J. Cahill
THOMAS J. CAHILL
United States Attorney

United States District Court
SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

MOHENDRA PARTABJI BUDHU,

Defendant.

INDICTMENT

75 Cr.

(18 U.S.C. §§ 911, 1001, & 1325.)

PAUL J. CURRAN

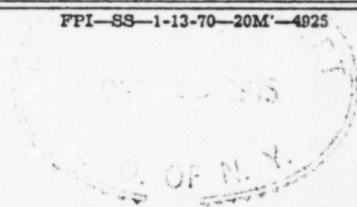
United States Attorney

A TRUE BILL

Aronald E. Burns, Jr.

Foreman

FPI-SS-1-13-70-20M-4025



JUDGE MOTLEY

12/22/75 - Def. (attg: ^{Werkfer J} Daniel Steinback)
pleads NOT GUILTY Bail \$5000.
fixed by Magistrate. Continued.
Def. Continued Remanded in lieu
of bail. Assigned MOTLEY J for
all purposes. 112

Knapp J

FEB 24 1976 DEFTS (DRY DANIEL STEINBACK PRESENT) APPL.
FOR REDUCTION OF BAIL IS DENIED.

SD Motley J

MAR 8 - 1976 JURY TRIAL BEGAN

MAR 9 - 1976 TRIAL CONTINUED

MAR 10 1976 TRIAL CONTINUED - JURY FINDS THE
DEFT GUILTY ON ALL COUNTS, (12-3) P.S.I. ORDERED
SENT 4056 TO 4-11-76 10^{AM} - DEFT REMANDED.

Motley J
(RWS)

APR 16 1976 DEPT (ATTY DANIEL STEINBOCK PRESENT) SENTENCE
TIME ALREADY SERVED

W. H. H. H.
(24)

CHARGE OF THE COURT:

(Motley, D.J.)

THE COURT: Ladies and gentlemen, before formally beginning the charge, I would like to thank each of you for the careful attention which you have given to the testimony and other evidence as it has come in.

I would also like to thank you for your cooperation in being prompt. I know that in order to serve on this jury each of you has had to make some business or personal sacrifice to be here, but you may recall that when you were seated here as jurors I reminded you that when you serve on a jury you are playing a vital role in the administration of justice. I want to remind you now that trial by jury is a basic and cherished institution in our system.

1
2 And I want to thank you, therefore, as I have
3 said, for performing your service as jurors in this case.

4 Before formally beginning the charge, also, I
5 would like to thank counsel on both sides in this case for
6 their cooperation with the Court and to congratulate each
7 of them on the high degree of professional skill which
8 each has demonstrated throughout the trial.

9 Now I trust that you will bear with me, ladies
10 and gentlemen, and give me that same degree of attention
11 which you have given throughout the trial, so that you may
12 carefully understand the legal principles which you are
13 to apply to the facts in this case as you find them.

14 As you approach the performance of your function
15 in this case, which is to determine the guilt or the
16 innocence of this defendant as to each count separately,
17 please remember that it is your duty to weigh the evidence
18 calmly and dispassionately, without sympathy or prejudice
19 for or against either the Government or the defendant.

20 You must also bear in mind that every defendant
21 appearing before this Court is entitled to a fair and
22 impartial trial regardless of his occupation or station
23 in life.

24 The fact that the Government is a party here,
25 that the prosecution is brought in the name of the

1 United States of America, entitles it to no greater
2 consideration than that which is accorded to any other liti-
3 gant.
4

5 By the same token, it is entitled to no less
6 consideration, and that is because under our system all
7 parties, Government and individuals alike, stand equal
8 before the Court.

9 As I have said, my function is to instruct you
10 as to the law applicable to this case, and you should
11 accept the law as I state it to you in these instructions
12 and apply the law to the facts as you find them.

13 The logical result of that is a verdict in
14 the case which, as I have said, you must return separately
15 as to each count, and of course your verdict is either
16 guilty or not guilty.

17 I want to caution you that you are not to single
18 out any one instruction alone as stating the law, but
19 you must consider these instructions as a whole.

20 You are not to assume that I have any opinion
21 as to the guilt or innocence of this defendant or as
22 to the truth or falsity of any of the charges made
23 against him in this indictment.

24 The fact that I have granted motions or
25 denied motions throughout the trial should not be taken by

1
2 you as any indication, as I said, that the Court believes
3 the defendant to be guilty or not guilty or the charges
4 true or false. As I told you before the trial com-
5 menced, these rulings have to do with questions of law and
6 not with questions of fact, which are for the jury.

7 If during the course of the trial a question
8 was asked and an objection interposed and I sustained the
9 objection, you are to disregard the question and any al-
10 leged facts contained in the question.

11 Similarly, if I ruled that an answer be stricken
12 from the record, you are to disregard both the question
13 and the answer in your deliberation.

14 During the course of these instructions,
15 I am going to refer to certain facts in evidence. The
16 fact that I refer to some of the testimony or some of the
17 exhibits or some of the evidence does not mean that I
18 believe that that is the most important evidence or the
19 only evidence which you should consider.

20 In deciding this case you have to consider
21 all the evidence, and with respect to the testimony you
22 have to consider all the testimony, both direct and cross-
23 examination, and all the exhibits and any stipulations,
24 as I have said before.
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3 As jurors, you are the sole and exclusive
4 judges of the facts. That means that you pass upon the
5 weight of the evidence. You determine the credibility
6 of the witnesses who have testified here, and you resolve
7 such conflicts, if any, as there may be in the evidence,
8 and you draw such reasonable inferences as may be warranted
9 by the testimony and other evidence in the case.

10 Again, with respect to any matter of fact, it
11 is your recollection which governs and yours alone. Any-
12 thing that counsel for the Government may have said or
13 anything which counsel for the defendant may have said,
14 whether in an opening statement or in the course of the
15 trial or in summations which you have just heard, is not
16 evidence.

17 So, too, anything which I may have said during
18 the course of the trial or may refer to here as evidence
19 is not to be substituted in lieu of your own recollection
20 of what the evidence is.

21 Again, the evidence in the case is the testi-
22 mony, the exhibits and the stipulation, and your verdict
23 must be based solely on the evidence, and your verdict
24 as to each count must be unanimous. It must be either
25 guilty or not guilty.

As I told you, as the jurors, you are the

sole judges of the credibility of the witnesses and the weight which their testimony deserves. You know, of course, that there is no automatic way to decide who is telling the truth and who is not. Credibility can be equated with believability and reliability. If a witness is credible, you say he is believable and reliable.

If he is incredible, you say he is unbelievable. There is nothing mysterious about these words.

By what yardstick are you to judge the credibility of the witnesses? Each of you has given careful attention to the witnesses as they testified here right before you. You observed the witnesses.

Issues of fact are presented for your determination, and as in every case, to a large extent, the resolution of disputed issues of fact depend upon the credibility which the jury attributes to the testimony of the witnesses and the support or lack of support which their testimony received from other evidence in the case.

Your duty is to decide the disputed issues of fact. In doing so, use your logic, your reason and your common sense, and do not be sidetracked or diverted or distracted by what you consider to be a minor or insignificant detail or irrelevancy, or by what you

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2 consider to be an appeal not to your reason or logic, but
3 to mere sentimentality or unthinking passion.

4 I repeat, use your common sense.

5 Again, you should carefully scrutinize all the
6 testimony given, both direct and cross-examination, the
7 circumstances under which each witness has testified, and
8 every matter in evidence which tends to show whether the
9 witness is worthy of belief.

10 Consider each witness' intelligence, motive
11 and state of mind and demeanor and manner while on the
12 witness stand. Consider the witness' ability to observe
13 the matters as to which he has testified and whether he
14 impresses you as having an accurate recollection of these
15 matters.

16 Again, you should consider the extent to which,
17 if at all, each witness is either supported or contradicted
18 by other evidence in the case.

19 Inconsistencies or discrepancies in the testi-
20 mony of a witness or between the testimony of different
21 witnesses may or may not cause the jury to discredit such
22 testimony.

23 Two or more persons witnessing an incident
24 or a transaction may see or hear it differently. An
25 innocent misrecollection, like failure of recollection, is

not an uncommon experience.

In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

In determining credibility and weight to be given the testimony of any witness, you must consider the testimony of the Government witnesses. The mere fact that they are employees of the Government entitles them to no more and no less consideration than any other witness. Nor should you be influenced by the number of witnesses because it is the quality of the testimony and other evidence which counts, not the quantity.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you think it deserves.

If you find that any witness has wilfully testified falsely as to any material matter, you may reject the entire testimony of that witness or you may accept such part or portion as commends itself to your belief, or which you find corroborated by other evidence in the case.

We had a couple of witnesses here, perhaps three, who testified as expert witnesses, so I want to say a

word about the testimony of expert witnesses.

The general rule is that witnesses are permitted to testify only as to facts and may not express their opinions. The exception to this rule is the opinion of a qualified expert on some particular technical matter. The expert may testify as to his opinion on a subject concerning which he has special knowledge. This is allowed on the theory that the advice of one experienced and versed in technical or special subjects will aid the jury. You may consider the expert's qualifications and opinion, weigh his reasons, if any, and give his testimony such weight as you feel it deserves.

As previously stated, expert opinion is purely advisory, and you may reject it entirely if in your judgment the reasons given for it are not convincing or sound. The determination rests with you, not with the expert.

The defendant has not taken the stand in this case. The fact that a defendant who has a right to do so has not taken the stand and testified in this case does not create any presumption against him, and cannot be considered by you as any evidence against him or a basis for any inference unfavorable to him.

You must not permit the fact that he has not taken the stand to weigh in the slightest degree against

him, nor should you discuss this fact during the course of your deliberations.

As I told you when the trial commenced, and I will repeat it now, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

That is because, as I have told you, the Government has the burden of proof in a criminal case. If a defendant is to be convicted with respect to any charge made against him in the indictment, the Government has the burden of proving that the defendant is guilty of that particular charge beyond a reasonable doubt.

Now, that is a burden which never shifts. It remains upon the Government throughout the entire trial. A defendant does not have to prove his innocence. On the contrary, he is presumed to be innocent of a charge made against him in an indictment.

This presumption of innocence, as I told you, was in his favor when the trial commenced, and continued in his favor throughout the trial; it is in his favor even as I instruct you now. It remains in his favor during the course of your deliberations in the jury room.

Now this presumption of innocence is removed only if and when, after your deliberations in the jury

room, you come to the conclusion that the Government has sustained its burden of proof, and that is to prove the defendant guilty of the particular charge which you are then considering beyond a reasonable doubt.

The question that naturally comes up, what is a reasonable doubt? The words almost define themselves. Reasonable doubt is a doubt founded in reason and arising out of the evidence in the case or the lack of evidence. It is a doubt which a reasonable person has, after carefully weighing all the evidence, the kind of doubt which would make one hesitate to act. It means a doubt that is substantial and not merely shadowy. Reasonable doubt is one which appeals to your reason, your judgment, your common sense and your experiences in life. It is not caprice, whim or speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant.

Now if after fair and impartial consideration of all the evidence you can candidly and honestly say that you are not satisfied of the guilt of this defendant as to the particular charge you are then considering, and that you do not have an abiding conviction as to the defendant's guilt as to that charge, such a conviction as you would be willing to act upon unhesitatingly

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2 in important and weighty matters in the personal affairs
3 of your own life, then you do have a reasonable doubt,
4 and in that circumstance it is your duty to acquit this
5 defendant of that particular charge.

6 On the other hand, if after such a fair and
7 impartial consideration of all the evidence you can candidly
8 and honestly say that you are satisfied of the guilt of
9 this defendant, that you do have an abiding conviction
10 as to this defendant's guilt, such a conviction as you
11 would be willing to act upon unhesitatingly in important
12 and weighty matters in the personal affairs of your own
13 life, then you have no reasonable doubt, and in that
14 circumstance you may convict the defendant of that
15 particular charge.

16 A reasonable doubt does not mean a positive
17 certainty beyond all possible doubt. It is practically
18 impossible for a person to be absolutely and completely
19 convinced of any controverted fact which by its nature is
20 not susceptible to mathematical certainty.

21 In consequence, the law in a criminal case is that
22 it is sufficient if the guilt of a defendant has been
23 established beyond a reasonable doubt, not beyond all
24 possible doubt.

25 As I told you when the trial commenced and

1 jkb
2 you were being selected as jurors, an indictment is not
3 proof or evidence. An indictment is merely a series of
4 charges or accusations. An indictment arises out of
5 a technique or a method or a procedure which we employ
6 in our system whereby one who is accused by a grand jury
7 of a crime or crimes is brought into court and then their
8 guilt or innocence is determined by a petit jury or a
9 trial jury, such as you are.

10 Therefore, the indictment has no evidentiary
11 value, and should not be considered by you as proving or
12 tending to prove any of the crimes charged in it.

13 Now with respect to those charges, as I have
14 told you repeatedly now, the Government has the burden
15 of proving a charge beyond a reasonable doubt.

16 As you know, the indictment contains three
17 counts. I believe I told you that when the trial commenced.
18 What I am going to do at this point is to read each charge
19 to you, and then I am going to tell you the essential
20 elements of that charge which you must find the Government
21 has proved beyond a reasonable doubt before you can find
22 the defendant guilty of a particular charge.

23 The defendant has entered a plea of not guilty
24 as to each charge. As a result he has put into issue
25

by his plea of not guilty the essential elements of each crime charged.

Before going to the indictment, however, I want to tell you about evidence in a case, because there are two kinds of evidence recognized and accepted in courts of justice, upon either of which you may find an accused guilty of a crime.

One is called direct evidence. The other is called circumstantial evidence.

Direct evidence tends to prove the fact in issue without need for any other amplification, although of course there is always a question whether that evidence is to be believed.

Circumstantial evidence, on the other hand, tends to show other facts from which the fact in dispute may reasonably be inferred. In other words, it is that evidence which tends to prove the fact in issue by proof of other facts which have a legitimate tendency to lead the mind to infer that the fact sought to be established is true.

In short, circumstantial evidence consists of facts proved from which the jury may infer by a process of reasoning other facts in dispute.

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2 It is not necessary that the participation
3 of a defendant be shown by direct evidence. Defendant's
4 connection to a crime charged may be inferred from such
5 facts and circumstances in evidence as would legitimately
6 tend to support such an inference.

7 Knowledge, wilfulness and intent of a defendant
8 need not be proved by direct evidence. Like any other
9 fact in issue, it may be established by circumstantial
10 evidence. In every criminal case, it is necessary for
11 the Government to prove beyond a reasonable doubt that a
12 defendant on trial had the necessary criminal knowledge,
13 wilfulness and intent.

14 Now, questions concerning a defendant's
15 knowledge, wilfulness and intent involve proof of a defend-
16 ant's state of mind, at the time of the alleged crime.

17 It is obviously impossible to prove directly,
18 that is by direct evidence, the operation of a person's
19 mind, because you cannot look into a person's mind and
20 see what his or her intentions are or were. But the
21 proof of the circumstances surrounding a defendant's
22 activities may well supply an adequate and convincing
23 basis for finding that a defendant acted knowingly,
24 wilfully, intentionally. In other words, the actions
25 of a defendant must be judged in their time and place.

jkb

Just as the full meaning of a word is commonly understood only in relation to other words in the sentence or in its context, so the meaning of a particular act or conduct on the part of a defendant may depend on the circumstances surrounding that act or conduct.

In determining the issue of knowledge, wilfulness and intent, you are entitled to consider any statements made by the defendant which are in evidence and any acts done by the accused which are in evidence, and all other facts and circumstances in evidence which may aid you in determining the defendant's state of mind.

You may consider such things as the age, background, occupation and experience of a defendant and whether such facts make it likely or unlikely, probable or improbable that a defendant fully and precisely understood what he was doing in regard to a transaction, and where relevant, in relation to others.

Now, in order to convict the defendant on any count -- and this applies to all three counts -- you must find beyond a reasonable doubt that he acted unlawfully, knowingly and wilfully.

You will hear these words repeatedly throughout, and so I want to define those words for you at this time.

Unlawfully means contrary to law. An act is done knowingly if it is done voluntarily and purposely, and not because of mistake, accident, mere negligence or other innocent reason.

An act is done wilfully if it is done knowingly, deliberately, intentionally, and with an evil motive or purpose.

In determining whether a defendant has acted wilfully, it is not necessary for the Government to have proved that the defendant knew that he was breaking any particular law or any particular rule. It must, however, prove a bad purpose or motive on the part of a defendant.

Knowledge, wilfulness and intent of a defendant, as I told you a moment ago, need not be proved by direct evidence. Like any other fact in issue, it may be established by circumstantial evidence.

Now we come to the indictment itself. The statute which the defendant is charged with violating in the first count or the first charge of the indictment is Section 1001 of Title 18, United States Code, which reads in pertinent part as follows:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States, knowingly

and wilfully makes or uses any false writing or document, knowing the same to contain any false, fictitious or fraudulent statement or entry, commits a crime."

I shall read Count 1 to you from the indictment.

Count 1. "The grand jury charges: On or about June 9, 1975, in the Southern District of New York, Mohendra Partabji Budhu, the defendant, in a matter within the jurisdiction of a department and agency of the United States, namely, the Immigration and Naturalization Service, United States Department of Justice, unlawfully, wilfully and knowingly did make and use a false writing and document, to wit, an application to file petition for naturalization, knowing said writing and document to contain false, fictitious and fraudulent statements and entries, to wit, that he served in the United States Army and had received an honorable discharge.

In order to find the defendant guilty of the crime charged in Count 1, you must be satisfied that the Government has established beyond a reasonable doubt each of the four following elements of that crime: First, that on or about June 9, 1975, in the Southern District of New York, the defendant knowingly and wilfully made or used a writing or document;

(2), the writing and document contained false, fictitious or fraudulent statements or entries;

(3), that the defendant knew that the writing or document contained false, fictitious or fraudulent statements or entries, and

(4), that the document or writing was used in a matter within the jurisdiction of a department or agency of the United States.

Now I want to discuss each of those four elements in a little greater detail. In connection with the first element, I charge you that Manhattan is in the Southern District of New York. I have already instructed you as to the meaning of the words "knowingly and wilfully."

As to the third element of this offense, you must find that the defendant knew that the writing or document contained false, fictitious or fraudulent statements or entries.

As I have already instructed you, knowledge and intent exist in the mind, and you may infer the requisite knowledge from such facts and circumstances in evidence as would logically sustain that inference.

In this connection, the Government points to certain facts which it claims supports an inference of knowledge on the part of the defendant. Here the Government

1
2 points to the lack of evidence that defendant served
3 in the Armed Forces after diligent search of records
4 in various places, the extent of the information given
5 by defendant on the application for citizenship, and the
6 importance of the document, that is, an application for
7 citizenship, and the fact that for those who served in
8 the Armed Forces, the law conferred on such applicants
9 certain benefits and considerations not applicable to
10 others.

11 Defendant, on the other hand, contends that the
12 Government has failed to prove beyond a reasonable doubt
13 that the defendant never served in the Armed Forces.
14 In this connection, defendant points to the evidence that
15 certain army records were destroyed by fire, some have
16 been lost in transit, some may have been misfiled, and
17 some sources were not searched.

18 Now as to the fourth element, as I told you,
19 the fourth element with respect to Count 1 of the indictment
20 is that the document or statement used or made was within
21 the jurisdiction of a department or agency of the
22 United States.

23 I charge you that the Immigration and Natur-
24 alization Service is a department of the United States.
25

1
2 If you find that the defendant submitted the
3 document in question to, or made the written statements
4 on an application to the Immigration and Naturalization
5 Service, then this fourth element is satisfied.

6 With respect to Count 1, if you find that the
7 Government has failed to prove beyond a reasonable doubt
8 any one of the four elements of the crime charged in
9 Count 1 which I have just enumerated and discussed for you,
10 then you must find the defendant not guilty of that
11 charge.

12 On the other hand, if you find that the Govern-
13 ment has proved beyond a reasonable doubt each of these
14 four elements of the crime charged in Count 1, then you may
15 convict the defendant on that count.

16 We come to the second count in the indictment,
17 and in connection with that count, the statute which the
18 defendant is charged with violating is Section 911 of Title 18
19 of the United States Code, and that section reads in
20 pertinent part as follows:

21 "Whoever falsely and wilfully represents himself
22 to be a citizen of the United States commits a crime."

23 Now I shall read to you Count 2.

24 "The grand jury further charges: On or
25

about the 22nd day of August 1972, in the Southern District of New York, Mohendra Partabji Budhu, the defendant, unlawfully, wilfully and knowingly did falsely represent himself to be a citizen of the United States in an application for employment at John C. Mandel Security Bureau, Inc."

In order to find the defendant guilty of the charge made against him in Count 2 you must find that the Government has proved beyond a reasonable doubt each of the following three elements of that charge:

(1), that on or about August 22, 1972, in the Southern District of New York, the defendant represented that he was a United States citizen;

(2), that that representation was false, and

(3), that the defendant made that representation wilfully.

Unless a false representation of citizenship is material, it cannot be the basis of a finding of guilt under this section. Materiality means (1), that the person inquiring has a good and sufficient reason for learning the citizenship of the person asked, and (2), that the false statement must have a natural tendency to influence or be capable of influencing a decision of the person or agency to which it was made.

Even if a false statement of citizenship was

made, unless you find beyond a reasonable doubt that it was material as just described, you must not convict.

If you find that the defendant represented himself to be a citizen of the United States, and that that representation was false, you must then determine whether he wilfully made the false statement, that is, whether he knew and believed his representation was false at the time when he made it.

I have previously defined the term "wilful" for you.

Now with respect to Count 2, if you find that the Government has failed to prove beyond a reasonable doubt any one of the three elements of the crime charged in Count 2 which I have just enumerated and discussed for you, then you must find the defendant not guilty on that charge.

If, on the other hand, you find that the Government has proved beyond a reasonable doubt each of these three elements, then you may find the defendant guilty on that charge.

We come to the final charge in the indictment, Count 3, and the statute which it is charged the defendant violated in that connection is Section 1325 of Title 8, United States Code, and that reads in pertinent part as

1
2 follows:

3 "Any alien who enters the United States at any
4 time or place other than as designated by the immigration
5 officers commits a crime."

6 I shall now read to you Count 3.

7 "The grand jury further charges: Mohendra
8 Partabji Budhu, the defendant, an alien, unlawfully,
9 wilfully and knowingly did enter the United States at
10 a place other than as designated by immigration officers."

11 In order to find the defendant guilty of the
12 crime charged in Count 3, you must find that the defendant
13 has established beyond a reasonable doubt each of the
14 following three elements of that crime:

15 (1), that the defendant was not a citizen of
16 the United States;

17 (2), that he entered the United States at
18 a place that the immigration officers of the United States
19 did not designate as a location at which he could lawfully
20 enter; and

21 (3), that the defendant was thereafter found
22 in the Southern District of New York, which as I told you,
23 includes Manhattan.

24 In connection with the second element of the
25 offense charged in Count 3, I instruct you that the

1 Immigration and Naturalization Service maintains records
2 of all lawful and designated entries of aliens into the
3 United States, and that the absence of such a record
4 may be considered proof that an alien entered at a place
5 other than as designated by the immigration officers.
6

7 However, the absence of such a record is not
8 necessarily conclusive of this fact, and you must find this
9 fact to have been established as you would any other fact
10 in this case.

11 With respect to Count 3, if you find that the
12 Government has failed to prove beyond a reasonable
13 doubt any one of these three elements of the crime charged
14 in Count 3 which I have just enumerated, you must find
15 the defendant not guilty on that charge.

16 If, on the other hand, you find that the
17 Government has proved beyond a reasonable doubt each of
18 these three elements of the crime charged in Count 3, then
19 you may convict the defendant on that count.

20 Now, the jury is not to consider or in any way
21 to speculate about the punishment which a defendant may
22 receive if he is found guilty. The function of a jury
23 is to determine the guilt or innocence of a defendant
24 on the basis of the evidence and the Court's instructions
25 as to the law.

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2 It is then for the Court alone or the Judge
3 to determine what the punishment will be, if there
4 is a conviction.

5 Under your oath as jurors, you are not to be
6 swayed by sympathy. You are to be guided solely
7 by the evidence in the case and the crucial hard core
8 question that you must ask yourselves as you sift through
9 this evidence is, where do you find the truth?

10 This is a quest for the truth. That is what
11 a trial is all about. It is not a battle of wits. It is
12 not a contest in salesmanship, and it is not a contest
13 in personalities. The only triumph in any case, whether
14 it be civil or criminal, is whether or not the truth has
15 triumphed. If it has, then justice has been done. If
16 not, justice will not have been done.

17 You are to determine the guilt or innocence of
18 this defendant solely on the evidence and the law as I
19 have just instructed you.

20 If you have a reasonable doubt as to the defend-
21 ant's guilt as to a particular charge, you should not
22 hesitate for any reason to find a verdict of acquittal.

23 Again, you must return a verdict as to each
24 count. The form of your verdict is either guilty or
25 not guilty.

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2 You may return a verdict of guilty as to each
3 count. You may return a verdict of not guilty as to
4 each count. You may return a verdict of guilty as to
5 some counts and a verdict of not guilty as to others.

6 If you are not able to agree on a verdict as
7 to a particular count, or as to more than one count,
8 you may not compromise by finding the defendant guilty
9 as to certain counts and not guilty as to others.

10 Your verdict as to each count, therefore, must
11 be unanimous as to that count, and must reflect the
12 conscientious conviction of each and every one of you.

13 The most important part of this case is the
14 part which you now as jurors are about to play, because
15 it is for you and you alone to decide whether the defendant
16 is guilty or not guilty of a particular charge. I know
17 that you will try the issues that have been presented
18 to you according to the oath which you have taken as jurors.
19 In that oath you promised you would well and truly try
20 the issue joined in this case and a true verdict render.

21 I suggest to you that if you follow that oath
22 and try the issues without combining your thinking with
23 any emotions, you will arrive at a true and just verdict.

24 It must be clear to you that once you get
25 into an emotional state and let fear or prejudice or bias

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2 or sympathy interfere with your thinking, then you will
3 not arrive at a true and just verdict.

4 As you deliberate, ladies and gentlemen, please
5 be careful to listen to the opinions of your fellow
6 jurors and to ask for an opportunity to express your own
7 views. No one juror holds the center stage in the jury
8 room and no one juror may control or monopolize the
9 deliberations.

10 If after listening to your fellow jurors and
11 if after expressing your own view you become convinced
12 that your view is wrong, do not hesitate because of
13 stubbornness or pride of opinion to change your view.

14 On the other hand, do not surrender your con-
15 scientious conviction solely because of the opinion of
16 your fellow jurors or because you are outnumbered.

17 When you retire to the jury room you may send
18 for any of the exhibits which you desire to see, or you
19 may have any of the testimony you desire read back.

20 You are instructed that you are not to reveal
21 the standing of the jurors, that is the split of the
22 vote, for any verdict, if that should occur, to anyone,
23 including the Court, at any time during your deliberations.

24 Will counsel now approach the bench.

25 We will take it in the robing room.

(In the robing room.)

THE COURT: Mr. Steinbock, do you have any exceptions to the charge?

MR. STEINBOCK: Yes, I do, your Honor, I am afraid.

The first is, when you said to the jurors to use their common sense. Well, I don't quarrel with that. I would request that you also say to them, they are not to substitute their common sense for evidence in the case, that is, they are not to use their common sense to fill in gaps in the evidence.

THE COURT: I think I told them repeatedly that they have to base their verdict on the evidence.

Anything else?

MR. STEINBOCK: Yes. Regarding reasonable doubt, in the Government's charge which I understood to be accepted yesterday, there is no mention that the doubt must be substantial and not merely shadowy, and I would object to that language. I think that is close to a right quote.

THE COURT: I think I did say that, a doubt which is substantial and not merely shadowy. You are objecting to that, you say?

MR. STEINBOCK: Particularly to the part, the

doubt has to be substantial. I think it has to be reasonable. I think that there is a difference between that and substantial. Substantial is a greater doubt. I would object to saying the doubt has to be substantial.

THE COURT: All right, anything else?

MR. STEINBOCK: I would also mention the exclusion of the fact that the jurors have to be convinced to a moral certainty from the reasonable doubt charge. That was mentioned in the Government's request, but I don't think your Honor mentioned it in her charge.

THE COURT: That the jurors have to be --

MR. STEINBOCK: Convinced of guilt to a moral certainty.

THE COURT: That was expressly ruled out in United States against Taylor by the Second Circuit.

MR. STEINBOCK: I will move on, then. I think the charge of reasonable doubt generally, and this was the Government's request, over-emphasized what reasonable doubt is not. It is not surprising that they would ask for that. And I think the charge did do that; it over-emphasized what a reasonable doubt is not, and what a reasonable doubt it.

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2 THE COURT: Well, I believe I said reasonable
3 doubt is one which appeals to your reason, your judgment,
4 your conscience.

5 MR. STEINBOCK: Right. All right. I believe
6 it was when you were marshaling the evidence regarding
7 knowledge and wilfulness, you said something to the effect
8 the Government's contentions are -- and then what follows
9 was, a diligent search of the records in certain places
10 shows that there are no records of him. I would object --

11 THE COURT: I said that was the Government's
12 claim. I was pointing out that the Government claims
13 it would sustain an inference of knowledge.

14 MR. STEINBOCK: I will withdraw that.

15 Also on Count 1 you instructed the jurors that
16 the fourth element of the offense was satisfied, and I
17 think, I submit --

18 THE COURT: If you find --

19 MR. STEINBOCK: If you find that the defendant
20 submitted documents to or made statements to the
21 Immigration and Naturalization Service, then this fourth
22 element is satisfied. That is a quote from the Government's
23 request.

24 THE COURT: Just a moment. Well, the statement
25 read this way: "If you find the defendant submitted

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2 a document in question to or made the written statement
3 on an application to the Immigration and Naturalization
4 Service,"then this fourth element is satisfied.

5 MR. STEINBOCK: I submit that that takes it
6 away from your directing a verdict on the fourth element.
7 It may be there wasn't too much dispute about it, but I
8 still think the jurors can't be told that they are satisfied,
9 that the element has been fulfilled, any more than they
10 can be told any other element of the charge has been found,
11 has been proven.

12 I think that is what that says.

13 MS. CUSHMAN: That only directs the fourth
14 element, it only suggests that the jury, if it finds the
15 fact that the documents were submitted to the Immigration
16 and Naturalization Service, has found the fourth element
17 satisfied. But they have been told over and over again
18 that they must find each element separately, and you are
19 not asking the Judge to ask the jury to find a fact that
20 Immigration -- that I.N.S. is an agency within the jurisdiction
21 of the United States, are you? That is not within the
22 province of the jury.

23 THE COURT: Let's go on.

24 MR. STEINBOCK: On Count 2, your Honor, I
25 believe when you were defining wilfully; you defined it as

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2 knowingly, though earlier on you had defined it as
3 deliberately and purposely and I think particularly in
4 regard to my argument on Count 2, I would want the jury
5 instructed that they must find that he made that check-
6 mark or the representation which is embodied in
7 the checkmark purposely and deliberately before there would
8 be any reasonable doubt.

9 THE COURT: Just a moment. I first defined
10 those terms and I said it applies to each count, and in
11 defining wilfully I did instruct the jury that wilfully
12 means with a bad motive or purpose.

13 An act is done wilfully if it is done knowingly
14 deliberately, intentionally, and with an evil motive or
15 purpose. And you are saying what?

16 MR. STEINBOCK: Well, when you specifically
17 were referring to Count 2, you said that wilfully only
18 means knowingly.

19 THE COURT: I did?

20 MR. STEINBOCK: I believe you did.

21 THE COURT: I don't think I did. In Count 2 I
22 said, if you find that defendant represented himself to
23 be a citizen of the United States and that that representa-
24 tion was false, you must then determine whether he wilfully
25 made the false representation, that is, whether he knew

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2 and believed his representation was false at the time
3 when he made it.

4 I have previously defined the term wilfully
5 for you.

6 Is that what you are referring to?

7 MR. STEINBOCK: Yes, that is right.

8 THE COURT: You are suggesting that I should
9 say that they should find that he what?

10 MR. STEINBOCK: That they must find beyond
11 a reasonable doubt that not only he knowingly made the
12 statement, but that he deliberately and purposely made
13 the statement.

14 THE COURT: I think I have done that by saying
15 they have to find that he unlawfully, wilfully and knowingly
16 with respect to any charge, and here I repeated it, "I
17 previously defined the term wilfully for you." And I
18 certainly did define knowingly and unlawfully at the
19 beginning.

20 MR. STEINBOCK: On Count 3, I would except to
21 the failure to read the whole statute and to then instruct
22 the jury that they have to find that he violated subsection
23 (1), and if they find, unless they find that it was beyond
24 a reasonable doubt, that subsection (1), they must acquit.

25 That is what we were talking about yesterday.

THE COURT: Oh, yes, I remember that.

MR. STEINBOCK: That is that they must eliminate the other possibilities which are described in the statute and that the statute itself recognizes that there are other illegal ways of getting into the United States which the defendant isn't charged with, and if they find that those -- he came in those ways -- they have to acquit.

THE COURT: All right.

Do you have any exceptions to the charge?

MS. CUSHMAN: No, your Honor.

MR. STEINBOCK: I think there is just one or two more things. One is that I object to what I think your Honor charged, Request No. 13 of the Government, that the absence of a record may be considered proof that an alien entered at a place other than as designated by the immigration officers. That is what I was talking about yesterday. It creates the presumption that he came in a particular illegal way rather than just indicating he came in some illegal way.

THE COURT: Just a moment. I didn't get that. Read that back, Mr. Reporter.

(Record read.)

THE COURT: All right. I understand.

MR. STEINBOCK: The last thing would be, your

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2 Honor, that there is a charge regarding this being a
3 search for truth. I am sorry to say I except to that
4 because it is really, I think, a search for proof beyond
5 a reasonable doubt of each of the elements, and by describing
6 it as a search for truth, I think it gives the jury
7 the impression that they should really decide what it
8 is that probably happened here, rather than deciding that
9 the particular elements of the offense were established
10 beyond a reasonable doubt. In other words, what we
11 take for truth we often know to a less certain degree than
12 that of beyond a reasonable doubt.

13 MR. LITTLEFIELD: It seems to me that truth
14 is absolutely the most positive sure thing there is.

15 MS. CUSHMAN: That is the way I understand it.
16 The overall charge has so completely and thoroughly dealt
17 with reasonable doubt --

18 THE COURT: You are overlooking the fact
19 that I followed that by saying, if you have a reasonable
20 doubt as to the defendant's guilt, you should not hesitate
21 for any reason to find a verdict of acquittal.

22 MR. STEINBOCK: I realize that, your Honor.
23 I just think --

24 THE COURT: Well, this is to say to jurors that
25 they are not to decide the case on whether they think one

1 lawyer's personality was better than the other. That is
2 not why we are here. It is not a battle of wits, we are
3 trying to determine the truth, and they have been told
4 repeatedly that they have to find that the Government
5 has proved its case beyond a reasonable doubt. And that
6 the trial is a search for what the truth is and
7 not a contest in gamesmanship.

8
9 Okay. Anything further?

10 MR. STEINBOCK: No.

11 THE COURT: All right. Let's return to the
12 courtroom.

13 (In open court.)

14 THE COURT: Mr. Ullah, I believe that the time
15 has come to excuse you, and I would like to thank you on
16 behalf of the citizens of the Southern District of New
17 York for your service on this jury. I am sorry that you will
18 not get an opportunity to deliberate with your fellow jurors
19 after having sat through this trial, but I am afraid that
20 that is often the fate of alternate jurors. But I am
21 sure you realize that your service was essential in the
22 event that one of the other jurors became incapacitated.

23 So you are excused now with the thanks of the
24 Court.

25 Do you have anything in the jury room?

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ALTERNATE JUROR: Yes.

THE COURT: Would you please get it and
leave before the other jurors have come in.

(Alternate juror excused.)

THE COURT: All right, will the clerk please
swear the marshal.

(Marshal sworn.)

6 THE COURT: At this point the only question
7 is whether there is evidence from which the jury could
8 find beyond a reasonable doubt that the statute was
9 violated in that the defendant entered the United States
10 at a place not designated by the Immigration Service,
11 and there is evidence from which the jury could so find,
12 so that the motion would have to be denied. That is what
13 he is charged with. These other hypotheticals he is
14 not charged with, coming in with a false passport. He
15 could have been charged with that, but the charge is made
16 here, and the only question at this juncture is whether
17 there is evidence from which the jury could find beyond
18 a reasonable doubt that this statute was violated, that
19 is, he came into the United States at some place, at
20 some time other than as designated by an immigration officer.

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CERTIFICATE OF SERVICE

June 23 , 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Jonathan J. Silberman